No. 57

APPELLEES' BRIEF.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Ninth Circuit.

October Term, 1892.

THE AMERICAN MORTGAGE CO., OF SCOTLAND, (LIMITED) *Appellants,*

VS.

ERVEN O'HARRA, et Al, *Appellees.*

EQUITY.

Appeal from the Circuit Court of the United States for the District of Oregon.

HENRY ACH, Attorney and Counsel for Appellees.

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STATEMENT.

The appellant, on the 16th day of December, 1885, filed its original bill of complaint, properly alleging jurisdictional facts. The bill then proceeds to charge that on the 21st day of April, 1883, the defendant O'Harra and his wife, in consideration of $1000, to them loaned by complainant, and to secure the payment of the money and interest, executed to the complainant a mortgage on the northwest quarter of section two,

township four north, range thirty-two east, Willamette Meridan, containing one hundred and sixty acres; that the mortgage was duly recorded; that it was intended by the defendants named to have mortgaged the southwest quarter of the property described, instead of the northwest quarter, and that, by error and mistake, the defendants gave said mortgage on lands they had no interest in whatever, but intending and supposing at the time they were mortgaging the southwest quarter; that the appellant intended to acquire a mortgage on the southwest quarter which was owned by the defendants named, and that the complainant relied on the mortgage as the sole security for the payment of the notes.

That thereafter one D. K. Smith purchased the land from O'Harra, with knowledge of the error in the description, and that the purchase by Smith was fraudulent and was intended to defraud the complainant:

That on September 22nd, 1884, Smith with intent to defraud appellant, and place the lands so conveyed to him by O'Harra, beyond the reach of appellant, conveyed the same to Thomas F. Rourke, and the plaintiff charges Rourke with knowledge and notice of these facts, both before and at the time of accepting the deed, and alleges that the lands were taken by him from Smith with intent to defraud appellant:

It is then sought by the usual allegations to have the mistake rectified and the mortgage foreclosed.

An answer was filed by the Rourkes, in which all and every knowledge of fraud was directly denied, so far as they were concerned, and in which all notice of complainant's rights at the time of the purchase by them of the land from Smith was also directly denied.

It is further alleged by the answer to the original bill, that the defendant Rourke purchased the land on September 22nd, 1884, from D. K. Smith, without any notice whatever, and paid full value for the lands; and the necessary allegations are made, under and by which defendant Rourke asserts himself to be an innocent *bona fide* purchaser.

Afterwards, on September 7th, 1889, a supplemental bill was filed, making as parties defendant, Oliver Cheeley and Christina Cheeley, his wife, and one Thomas Thompson, in and by which supplemental bill a mutual mistake between the O'Harras and appellant is properly pleaded; and it is further alleged that since the filing of the original bill in 1885, defendant Rourke and wife conveyed the real estate intended to

be mortgaged by the O'Harras to the defendant Christina Cheeley, and that she, at the time of the filing of the supplemental bill, held the legal title.

It is also charged that at the time of the conveyance to Christina Cheeley, such conveyance was made and received with full knowledge of complainant's rights, and with full knowledge of appellant's claim against the real estate.

Thompson is made a party defendant for the reason that he holds a mortgage upon the real property executed to him by the Cheeleys, and is also charged with full notice.

To the supplemental bill, an answer was filed by the defendants Rourke and wife, and Oliver Cheeley and wife, and Thomas Thompson, in and by which all knowledge of fraud is directly denied, as is also all notice. The answer, in effect, followed the original answer filed in the case, and further, set forth the fact that Thomas F. Rourke and wife, by deed of warranty, sold and conveyed the property by them purchased from Smith, which the complainant seeks to have applied to the satisfaction of its mortgage, to Christina Cheeley, and that the said warranty covenants against all incumbrances upon the property. A decree was rendered in favor of defendants Rourke and Cheeley, in and by which it was determined that the property was duly conveyed by Smith to Thomas F. Rourke, and that afterwards the same property, that is, the southwest quarter, was conveyed by warranty by Rourke and wife to defendant Christina Cheeley, who now holds the legal title to the same, and that Christina Cheeley is a bona fide purchaser of the property without any knowledge of the plaintiff's rights by virtue of the mortgage executed by O'Harra, and that plaintiff is not entitled to have the description in the mortgage corrected, or to have said mortgage made a lien upon the property, and the bill was dismissed

By a reference to the errors assigned (pp. 19, 20 and 21 of Trans.) it will be perceived that the only errors alleged against these appellees are not errors of law, but it is claimed by the appellant that the Court erred in its findings, for the reason that the same are against the evidence and are not sustained by the evidence.

The second assignment of error is to the effect: "That "there was error in the finding and decree of the Court, "that the defendant Rourke was an innocent purchaser of "the property * * and as such was entitled to hold the

"same free of the lien by the complainant sought to be "charged thereon by its mortgage * * for that it doth "appear by the evidence in the cause, and so the finding and "decree should have been, that the defendant Rourke was "not such an innocent purchaser, or a purchaser at all "thereof, except subject to your petitioner's mortgage, and as "such subject to the lien by your petitioner's bill sought to "be charged thereon, and with full knowledge that the "mortgage in the bill of complaint referred to was intended "to be a mortgage upon the property by the said Rourke "purchased and in the answer of said Rourke set forth."

The third assignment of error is in effect the same.

The fourth assignment of error is substantially identical, except that the name of Christina Cheeley is substituted in in place of Rourke.

The fifth and last assignment of error is to the effect that the Court erred in finding Christina Cheeley to be an innocent purchaser, by reason of the fact that this suit was pending at the time of her purchase.

The first assignment of error is a claim made by appellant that the Court erred in dismissing the bill, and an assertion that the petitioner was entitled to a decree foreclosing the mortgage upon the southwest quarter of section two, township four north, range thirty-two east, Willamette Meridian, although the mortgage was executed upon the northwest quarter of section two, township four north, range thirty-two east, Willamette Meridian.

FIRST POINT.

Counsel for appellant in his brief does not in anywise allude to this first assignment of error, and we presume that he has therefore abandoned the claim that error was committed in the dismissal of the bill by the decree.

If Rourke or Cheeley were the owners of the southwest quarter, as against the mortgage of the appellant of northwest quarter, it certainly would have been extremely damaging to their title for the Circuit Court to have decreed a foreclosure, or to have rectified the mortgage as against their title. We think the mere statement of the proposition is sufficient argument against this assignment of error.

Second, Third, Fourth and Fifth Assignments of Error.

As we have stated, a casual glance is sufficient to determine

the question that these assignments of error are simple attacks upon the facts found by the Court. We will not dispute that O'Harra intended to mortgage the property now owned by Mrs. Cheeley, and that O'Harra had no interest in the property which he had mortgaged to the American Mortgage Company.

In the brief of appellant, (p. 4) is found this language: "Were Cheeley and wife innocent purchasers without notice "of complainant's equity? *This is a disputed question, rais-* "*ing questions of law and fact.*"

"*If the disputed question be found for the defendants the* "*decree below was correct and should be affirmed.*"

The argument now advanced will have application as against all the other assignments of error and, upon all other phases of the case.

By the above quotation, appellant directly admits that the question for this Court to determine is one of a disputed question of fact. The appellant comes to the Circuit Court of Appeals and requests the Court to reverse a decree upon the allegations of his bill, and on the threshold admits that the only errors claimed are conclusions of the Court below upon the facts of the case and upon the evidence presented.

Without, at this time quoting at length from the testimony contained in the transcript, we beg to invite attention to the fact that at no place in appellant's brief is it asserted or claimed that there was not some evidence to sustain the findings of the Court below, and in presenting the matter for consideration, it is nowhere denied in the brief that there was testimony to sustain the conclusions of the Court upon the facts; but, on the contrary, the argument of appellant and the quotations from the testimony, show that there existed direct testimony to support every conclusion of fact made and also the decree. We presume it will not be contended by counsel that there was no evidence tending to support the claim that Rourke was a bona fide purchaser. If it is the intention to so claim, it will be remembered that the sworn answer of the Cheeley's and Rourke is before the Court, as is also the direct testimony of Mr. Rourke to the effect that when he purchased this land he did not know of the transaction between the Mortgage Company and O'Harra; that he did not know that the Mortgage Company claimed a mortgage upon the land which he purchased; that he paid his money and value for the lands, and all this was done after he had employed an

attorney, who had searched the records and reported that the title to the property was absolutely free from any incumbrances, and that Smith was the owner thereof.

The rules of this Court have some application to the point we now propose to advance; under the head of "Practice," it is asserted:

"The practice shall be the same as in the Supreme Court "of the United States, as far as the same shall be applicable."

Rule 8, U. S. Circuit Court of Appeals.

The Supreme Court of the United States have long since held that where there was a conflict of evidence in the Court below, and where there was evidence to sustain the decree, the Supreme Court would not reverse the decree upon a mere doubt caused by a conflict of testimony.

In the case of the Philadelphia, W. & B. R. R. Co. vs. Towboat Co., it is said by Mr. Justice Grier, in delivering the opinion of the Court: "There was evidence to support "the decree; and we can see no manifest error into which "the Court below has fallen; *appellants ought not to expect "that this Court will reverse a decree merely upon a doubt "created by conflicting testimony.*"

23 How., p. 209.

In the case of Morewood vs. Enquist, the same learned Judge says: "We have frequently said that appellants should not expect this Court to reverse a decree of the Circuit Court merely upon a doubt created by conflicting testimony."

23 Howard, 491.

In the case of Lancaster vs. Collins, it is said by Mr. Justice Blatchford, delivering the opinion of the Court: "This Court cannot review the weight of evidence, and can "look into it only to see whether there was error."

115 U. S. Reports, 225.
St. Paul Plow Works vs. Starling, 140 U. S., 197.
Bank vs. Cooper, 137 U. S., 475.
Callaghan vs. Meyers, 128 U. S., 617.

By a reference to the complaint herein, it will be seen that the complainant does not waive an answer under oath. An examination of the transcript, as before stated, will disclose that the answers to both the original and supplemental bill were answers under oath. Bearing in mind that the complainant charges notice and fraud as against these defendants, and also that the defendants, after directly denying all fraud and knowledge, fully and completely allege their position as

bona fide purchasers, and the facts making them such *bona fide* purchasers, then follows the application of the familiar rule in Federal equity practice that the answer stands as evidence for the defendants, and as such, must be contradicted. As late as 1889, the Supreme Court has had occasion to again enunciate this doctrine, and it is declared that when the plaintiff in a suit in equity "does not waive an answer under oath, the defendant's answer directly responsive to the bill is evidence in his behalf."

Dravo vs. Fabel, 132 U. S. Rep., 487.
Conley vs. Nailor, 118 U. S. Rep, 127.

Remembering that there is an abundance of testimony to sustain the allegations of defendant's answer as to the fact that he purchased the property from Smith; that he had no notice of the claims of the Mortgage Company; that he paid value, and also the testimony of the other witnesses in the case in support of the contentions of defendant Rourke, we assert that there was no testimony of any kind introduced to contradict the sworn answer of the defendants in so far as the same was directly responsive to the bill.

In our judgment no evidence was introduced to sustain the allegations in the bill fraud or notice against this defendant.

Where answers under oath, required by the bill, are made denying the fraud alleged in the bill, and the necessary evidence to support such allegation is wanting a decree dismissing the bill, will not be reversed.

Morrison vs. Durr, 122 U. S., 518.

We shall not burden this brief with an argument on all the testimony contained in the transcript, but shall now only allude to sufficient thereof to properly present to the Court the propositions of law and the legal problems presented by the appellee in his brief.

It appears that at the time of the purchase of the land in question by the defendant Reurke from D. K. Smith, that there existed in Pendleton, in Oregon, a law firm composed of Messrs. Turner, Bailey & Balleray, and that the firm was doing business under this firm name. It may be admitted that the firm was general counsel under retainer of D. K. Smith, Rourke's vendor. Mr. Rourke called upon Mr. Balleray and employed him for the purpose of examining the title to the land by him subsequently purchased from Smith. It may be admitted that Smith knew of the error in description of the mortgage to the American Mortgage Company at

the time that he took his conveyance from O'Harra, and for the purpose of this argument it may also be granted that it was Mr. Smith's intention to defraud the American Mortgage Company. The evidence sustains the position that at the time of his employment by Mr. Rourke, Mr. Balleray had no notice whatever of the existence of the mortgage in favor of the Mortgage Company. and had no knowledge of the error which was subsequently disclosed, and that he did not discover it until some two or three months after the property had been conveyed to Mr. Rourke by Smith. No knowledge of the existence of this mistake or of the existence of this mortgage is shown to have been had by either of the members of this law firm. However, under the testimony, it is claimed by the appellant as against the direct testimony of the attorney, Mr. Balleray, that some one of the members of the firm of Turner, Bailey & Balleray did have knowledge or notice, and under this assumption which is not proven, the legal proposition is advanced and it is contended by the appellee that such notice was notice to Mr. Rourke.

While it is a general rule, that notice to an attorney, whether actual or implied, is considered notice to the client, and the latter is bound, still, there are qualifications upon this rule and many exceptions are drawn from it. The essential particular regarding this question of notice to the attorney and one which must be shown to exist, is, that the notice and knowledge to the attorney must be acquired during the existence of his agency, but notice to agent or counsel employed by any other person, in any other business, at another time, will not be constructive notice to his principal or client employing him afterward. Nor is the client bound if the notice is received in any independent prior transaction.

Hood vs. Fahnestock, 8 Watts., 489.

Weeks on Attorneys-at-Law, 2nd. Ed. (Boone), § 237.

The mere employment of a solicitor to do a ministerial act, does not bind the client by notice to the solicitor outside of such act.

Wyllie vs. Pollen, 32 L. J. Ch., 782.

It must now be borne in mind that Mr. Balleray was employed by Mr. Rourke for the purpose of examining the title to the real property which he purchased from Mr. Smith, and that Mr. Balleray testifies that he examined the title, fur-

nished an abstract, and it is in evidence that he gave a written opinion to the effect that the property by Rourke purchased was free from all incumbrances.

In the case of Trentor vs. Pothen, an attorney was employed for the sole and special purpose (as in this case), of examining an abstract of the title to the property, and give an opinion as to its sufficiency. At the time of his employment, the attorney had acquired in another transaction, notice of the pendency of a suit which affected the title to the real property, which he did not disclose to the person by whom he was employed to examine the title, and it was directly held that notice to an attorney, acquired in another transaction as to the pendency of a suit which might affect the title to the real property, cannot be imputed to one who employs him for the sole and special purpose of examining an abstract of the title of the property and giving an opinion as to its sufficiency..

Trentor vs. Pothen, 46 Minn. Rep., 298.

It is remarked by the Court in that opinion, and we adopt the language as argument herein. "If a party who employs "an attorney for the special purpose of examining an abstract, "and passing upon the record title is to be charged with "notice of all knowledge which the attorney may have pre- "viously acquired from other transactions for other parties, "it would be very dangerous to employ an attorney at all, "for any such purpose, and the one whom it would be most "dangerous to employ would be the attorney having the "most experience and the most extensive practice."

It certainly will not be contended by counsel for appellant in the face of this evidence, that Mr. Balleray, the member of the firm who was employed to examine the title for Mr. Rourke, had any actual notice of the existence of the mortgage to the American Mortgage Company, but it seems to be claimed that if either of the other members of the firm had such notice, that it would be constructive notice to Mr. Balleray, and in turn constructive notice to Mr. Rourke. This in our judgment would not be a correct position, even if the law was not in accordance with the Minnesota case just cited. We do not think that notice to one member of a law firm is notice to all the members of such firm, even in a matter in which notice would be properly imputed to a client who was being advised by the member of the firm who had such notice.

In the case of St. Louis R. R. Co., vs. Bennett, there was a legal firm composed of Bennett, Lewis & Bennett; one of the members of the firm received from the R. R. Co. a draft to deliver to a third person in settlement of a law suit, and in in such suit none of the members of the firm represented the R. R. Co., or had anything to do with the case, and it was held that a notice of an attorney's lien served upon the members of the firm, other than the one who actually received the draft, would not be notice upon the attorney receiving the draft, or make such attorney chargeable with negligence in delivering the draft according to instructions.

35 Kansas, p. 395.

Then again, to be notice to a client, it must be shown to have been given to an attorney after the relation of attorney and client is formed, and it is not sufficient to show that the notice is first and the retainer afterwards.

McCormick vs. Joseph, 83 Ala., 401.

Weeks on Attorneys-at-Law, 2d Ed. (Boone), § 237, Note 4.

Without further discussing the evidence under which we claim that Rourke was a *bona fide* purchaser in 1884, more than a year prior to the commencement of the suit by appellant, and assuming that the Court will so determine, we now proceed to the discussion of the last remaining point.

On June 7th, 1889, and about four years subsequent to the filing of the original bill, a supplemental bill was filed for the purpose of making the Cheeley's parties defendant. An inspection of the transcript will indicate that Mrs. Cheeley purchased the property about three years after the commencement of the action, and we contend there is no evidence to show any actual notice of the pendency of this suit in Mrs. Cheeley prior to her purchase of the property, nor is there any evidence which satisfactorily proves the fact that Mrs. Cheeley had actual notice of the existence of the mistake in the mortgage prior to her purchase. It must be borne in mind the answer of the Cheeley's, duly verified, is on file, and no evidence is produced which tends to prove notice, save and except the fact that a witness was called who undertakes to represent that after the purchase by Mrs. Cheeley, Mr. Cheeley, the husband of the owner, admitted that he knew, prior to the purchase of the property, of the existence of this mortgage and the mistake.

As we understand the law, and as it undoubtedly is, it is

unnecessary to discuss the question as to the effect of the pendency of an action where no notice of a *lis pendens* has been filed, or to consider the effect of the pendency of an action in the absence of statute law on the subject of *lis pendens*. We also deem it useless to enter into a discussion on the effect of the testimony tending to show admissions of Mr. Cheeley as against the sworn answer. Our reason for avoiding this discussion is, and it certainly must be admitted, under the evidence, that defendant Rourke is an innocent *bona fide* purchaser. We will assume that Mrs. Cheeley, at the time of her purchase from such innocent *bona fide* purchaser, had notice of the equities asserted by the American Mortgage Company. The question is then presented as to whether a purchaser with notice of outstanding equities, not being a former owner, can obtain a good title as against the equities when purchasing from an innocent *bona fide* holder.

The doctrine of *bona fide* holder and purchaser, and the rights of holders by and through *bona fide* purchasers have been considered many times by the highest courts of this nation, and in view of the many decisions of all courts of last resort upon this proposition, we feel somewhat loth to now present, as we deem we must, by reason of appellant's brief, the authorities now cited:

Mr. Pomeroy, in his work on Equity Jurisprudence, in terse words lays down the rule: "The second rule is, *that if a "second purchaser with notice, acquires title from a first pur- "chaser who was without notice and bona fide, he succeeds to all "the rights of his immediate grantor. In fact, when land once "becomes freed from notice into the hands of a bona fide pur- "chaser, he obtains a complete* 'JUS DISPONENDI' *with the excep- "tion last above mentioned, and may transfer a perfect title "even to a volunteer.*"

The exception alluded to is one where such purchaser is a former owner affected with notice.

Pomeroy's Eq. Jurisprudence, Vol. 2, § 754, and cases cited.

The Supreme Court of the United States laid down the rule to the same effect in the following language: "Where the "first indorsee, without notice of any prior equities between "the original parties, purchases, for value, a negotiable instru- "ment, the second indorsee, who acquires it before it is due, "and for value, takes a good title, although he had notice of "such equities."

Commissioners vs. Clark, 94 U. S. Rep., p. 278.

The Supreme Court of California has likewise had occasion to pass upon this question, and in the opinion of the Court will be found the following statement of the rule: "It has "been justly settled in cases of fraudulent sales of real estate, "that if the title once vests in an innocent purchaser, anyone "can afterwards purchase of him with full knowledge of the "original fraud; otherwise the innocent purchaser could not "enjoy the full right of alienation, and his property would be "consequently diminished in value."

Dorsey vs. McFarland, 7 Cal. Rep., 346.

Mills vs. Smith, 8 Wall., 32.

Devlin on Deeds, §§ 747–748 and cases cited.

The Supreme Court of Nevada, in the case of Allison v. Nagan, states the proposition and rule, as follows: "It is a "well settled rule in equity that a purchaser with notice from "a *bona fide* purchaser for a valuable consideration, who "bought without notice, may protect himself under the first "purchaser. The only exception to this rule of law is where "an estate becomes revested in the original party to the "fraud; the original equity reattaches to it in his hands."

12th Nevada Rep., 38.

In this connection we again assert to this Court that in the judgment of counsel for the appellee, there is not a scintilla of evidence imputing knowledge or notice of the appellant's equities to defendant Rourke, the vendor of Mrs. Cheeley, and there is no evidence of any character associatiug the defendant Rourke with any fraud in the entire case under discussion.

In conclusion, we beg to add, it should be borne in mind that the defendant Rourke conveyed the property, which the appellant seeks hereby to render subject to its mortgage, to the defendant Mrs. Cheeley, by deed of warranty, and having thus guaranteed against all incumbrances, Rourke, the *bona fide* purchaser, is the real party in interest.

The decree of the Circuit Court should be affirmed.

Respectfully submitted,

HENRY ACH,

For Appellees.